U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

DATE: MAY 17 2013 OFFICE: TEXAS SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner seeks classification under section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions with progressive post-baccalaureate experience equivalent to an advanced degree. The petitioner seeks employment as a high school mathematics teacher for [redacted] At the time she filed the petition, the petitioner taught at [redacted] Maryland. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions with the defined equivalent of an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a brief from counsel and copies of recent assessment scores.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. –
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> > (A) In General. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer –
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions with progressive post-baccalaureate experience equivalent to an advanced degree under the regulation at 8 C.F.R. § 204.5(k)(3)(ii)(A). The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the

Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990, published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now U.S. Citizenship and Immigration Services (USCIS)] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

In re New York State Dept. of Transportation (*NYSDOT*), 22 I&N Dec. 215 (Act. Assoc. Comm'r 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, the petitioner must show that the alien seeks employment in an area of substantial intrinsic merit. Next, the petitioner must show that the proposed benefit will be national in scope. Finally, the petitioner must establish that the alien will serve the national interest to a substantially greater degree than would an available United States worker having the same minimum qualifications.

While the national interest waiver hinges on prospective national benefit, the petitioner must establish that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The intention behind the term "prospective" is to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

The AAO also notes that the USCIS regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

The petitioner filed the Form I-140 petition on March 5, 2012. In an accompanying introductory statement, counsel stated that the petitioner "is a highly qualified Mathematics educator and will therefore continue to be an asset to the United States educational system." Counsel listed the petitioner's evidentiary exhibits but did not address the *NYSDOT* guidelines or explain how the petitioner meets them.

The petitioner submitted her own 16-page statement, in which she described her experience, credentials, and goals. She stated:

> After eleven years of teaching mathematics at [redacted] in the Philippines, [i]n August 2003, I was selected for the [redacted] from a large pool of applicants. The [redacted] is a three-year teaching exchange program designed for outstanding and world-class international teachers. . . . During my three-year tenure as a Mathematics Teacher at [redacted] North Carolina, I . . . exceeded the expectations of both the [redacted] and the host school district. . . .
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> On my second year as a [redacted] teacher, I had successfully reached the highest level in the [redacted] . . . And on my third year as a [redacted] teacher, I was selected to serve as a Local Advisor for the School Year 2005-2006. A Local Advisor is a person with impeccable leadership skills, a good listener and who has a mission beyond them self [*sic*] which allows them to influence new VIF teachers in a way that will impact their entire perception of [redacted] the United States and their experience as a cultural exchange teachers [*sic*]. . . .
>
> In August 2007, I transferred to [redacted] . . . , a four-year comprehensive high school, as well as a Science and Technology Center, [where] I was able to serve a varied student population ranging from those qualified for the Science and Technology Program to those in the special education program. I was successfully able to work with students throughout the range of abilities.

The petitioner described her involvement in several activities and initiatives at [redacted] School, including mentorship programs and "smaller learning communities [that] focus on academic and social development and provide intensive support systems to enable students to attain grade-level proficiency." The petitioner also noted that she was on the school's faculty when '[redacted] was rated as 'One of America's Top High Schools' by the [redacted] Regarding her efforts after her 2011 transfer to [redacted] the petitioner stated:

> I stand out as a great addition to the Mathematics Department. Due to my deep content knowledge and . . . excellent pedagogy . . . , I am assigned to teach three diverse classes of Trigonometry-Analysis . . . [and] three Geometry classes. . . . I generously offer extended learning opportunities to my students by giving tutorials. . . . I consistently attend numerous Professional Development workshops and seminars to gain more knowledge and experience. . . . I strongly believe that I am doing an outstanding performance and having a very substantial impact in [*sic*] my students especially in preparing the juniors and seniors for college education.

The petitioner submitted copies of teacher evaluations, showing consistent ratings at the "Satisfactory" level (the highest of three available levels). The petitioner also submitted several

exhibits under the heading "achievements and recognitions." Nearly all of these exhibits are from the [redacted] The most specific such exhibit is a September 2, 2005 letter, attributed collectively to "[redacted]" indicating that that the petitioner "successfully reached the highest level in the [redacted]" The letter did not indicate that the petitioner reached this level through educational contributions. Rather, she attained it by having "earned 6000 or more points . . . through [her] participation in cultural activities in [her] schools and communities."

Apart from the [redacted] materials, the remaining "achievements and recognitions" consist of two certificates from [redacted] a June 19, 2009 "Teacher Recognition Certificate," acknowledging the petitioner's "Commitment & Dedication to the Students of [redacted]" and June 17, 2010 "certificate of appreciation . . . for dedication and service to [redacted]"

The petitioner submitted letters from teachers and administrators at schools where the petitioner has worked, and from a VIF official. These witnesses praised the petitioner's efforts and abilities, but did not claim that her work has had any significant impact or influence beyond the schools where she has taught. At most, they indicated that education in the United States would benefit if more teachers were like the petitioner.

On June 7, 2012, the director issued a request for evidence, stating: "The record fails to establish that any independent company, public or private schools is [*sic*] pursuing a development of the petitioner's work. Please submit evidence to establish that the beneficiary's past record justifies projections of future benefit to the nation" (emphasis in original). The director did not specifically identify *NYSDOT*, but set forth the guidelines from that decision that the petitioner must meet.

In response, the petitioner submitted copies of background materials regarding the state of mathematics education in the United States. Counsel stated that "American students have become less competitive against pupils of other countries in Science and Mathematics. . . . [T]here is a lot of work to be done by 'Highly Qualified' Math teachers like" the petitioner. Counsel highlighted the words "Highly Qualified" with capital letters and quotation marks to indicate that the petitioner meets the statutory definition of a "Highly Qualified Teacher" in the No Child Left Behind Act of 2001 (NCLBA).

Counsel asserted that, because Congress passed the NCLBA after the issuance of *NYSDOT*, that statute therefore supersedes the precedent decision. Counsel cited no statute, regulation, or case law that specifically supports this claim. The assertion that the NCLBA modified or superseded *NYSDOT* is not persuasive; that legislation did not amend section 203(b)(2) of the Act. In contrast, section 5 of the Nursing Relief for Disadvantaged Areas Act of 1999, Pub.L. 106-95 (November 12, 1999), specifically amended the Immigration and Nationality Act by adding section 203(b)(2)(B)(ii) to that Act, to create special waiver provisions for certain physicians. Because Congress not only can amend the Act to clarify the waiver provisions, but has in fact done so in direct response to *NYSDOT*, counsel has not established that the NCLBA indirectly implies a similar legislative

change. Neither the Immigration and Nationality Act nor the No Child Left Behind Act, separately or in combination, create or imply any blanket waiver for teachers.

Counsel contended that the NCLBA gave the petitioner's occupation national scope because the petitioner meets that statute's definition of a "highly qualified teacher." The national interest waiver is not available to a member of the professions who holds only a bachelor's degree; an advanced degree is required even to qualify for consideration for the waiver. *See* sections 203(b)(2)(B) and (3) of the Act. Sections 9101(23)(B) and (C) of the NCLBA, however, require only a bachelor's degree for a "highly qualified" teacher. Section 9101(23)(B) of the NCLBA also refers to "highly qualified" teachers who are "new to the profession," showing that such a teacher need not have at least five years of progressive post-baccalaureate experience, which is equivalent to a master's degree under the USCIS regulation at 8 C.F.R. § 204.5(k)(3)(ii)(B). Thus, the "highly qualified" label is available to an intending immigrant who would not qualify for classification under section 203(b)(2) of the Act. Therefore, the petitioner has not established that a "highly qualified" designation under the NCLBA presumptively qualifies that intending immigrant for a benefit available only to those who qualify for classification under section 203(b)(2) of the Act.

The general assertion that improved education serves the national interest is not sufficient. There are a great many activities that collectively benefit the United States, but it does not follow that every foreign national engaged in a beneficial occupation is entitled to a waiver of the job offer requirement that Congress created and which remains in force.

Counsel mentioned other sources that affirmed the importance of education, and stated that these materials "determined the employment of Math teacher as national in scope." Counsel thus conflated the national importance of "education" as a concept, or "educators" as a class, with the impact of one teacher.

Counsel contended that privacy considerations "prevent[] the self-petitioner from obtaining information of her colleagues regarding their credentials to determine what contribution they have accomplished for purposes of comparing whether her contributions are greater than those 'Available [*sic*] U.S. Workers." *NYSDOT*, however, does not require the petitioner to compare her private or proprietary records with those of other teachers. Rather, the petitioner must establish a record of influence on the field as a whole. To do so does not require an invasive review of other teachers' credentials. Rather than establish such a record of influence, counsel has asserted that the *NYSDOT* guidelines ought not apply to "math teachers." The petitioner has failed to establish that *NYSDOT* guidelines do not apply to math teachers, or to teachers in general.

The director denied the petition on November 30, 2012. The director discussed the petitioner's evidence and quoted from several witness letters, and concluded that the petitioner had not shown how her work, individually, would produce benefits that are national in scope.

On appeal, counsel repeats the claim that "the NCLB Act and the Obama Education Programs, taken collectively, provide the underlying context for" approving national interest waivers for highly

qualified teachers. A substantial portion of the brief consists of variations on this basic claim. Counsel identifies no specific statutory or regulatory provision granting blanket waivers to teachers, and USCIS lacks the authority to create such a blanket waiver. Counsel amply establishes that Congress and the present administration have emphasized the importance of educational reform, but counsel has identified no explicitly immigration-related component of these policy pronouncements. It cannot suffice for counsel to state that the passage of the NCLBA created "protected rights [for] 'American students' to have 'highly qualified teachers," and to assert that denial of the waiver amounts to a violation of those rights.

Counsel emphasizes the "national priority goal of closing the achievement gap," but cites no evidence to show that the petitioner has produced nationally significant results in this regard. Counsel also cites test results showing that ' did not meet its Reading proficiency AMO targets." Counsel did not explain the relevance of this information, given that the petitioner is a math teacher (as counsel, elsewhere, has repeatedly emphasized). Rather than provide information specific to the petitioner, counsel repeats the assertion that, as a "highly qualified teacher," the petitioner's work is consistent with the goal of "closing the achievement gap."

Counsel stated: ' rated as One of America's Top High Schools from School Year 2008 to 2009. Because of that, [a] Certificate of Recognition was awarded to [the petitioner] for her commitment and dedication to the students of dated 19 June 2009." This wording implies that the rating was the basis for the certificate. The record shows that gave the petitioner a similar certificate the following year. Printed at the bottom of the 2009 certificate is the phrase: ' rated as One of America's Top High Schools / School Year 2008-2009." The certificate did not indicate that credited the petitioner, specifically, with this distinction, or that the certificate was directly related to that designation. Rather, the school gave the petitioner a "teacher recognition certificate" at the end of the 2008-2009 school year, and a "certificate of appreciation" at the end of the 2009-2010 school year. The record does not reveal whether presented these certificates only to her, or to a select handful of teachers, or to every member of the faculty. There is not sufficient information to conclude that these certificates represent unusual distinctions in the field of teaching. Furthermore, the petitioner submitted no evidence from the publishers of to establish that the petitioner, in particular, merited special credit for 's selection as a top high school.

Counsel claims: "the Immigration Service is requiring more from the beneficiary's credentials and tantamount to having exceptional ability," even though one need not qualify as an alien of exceptional ability in order to receive the waiver. It remains that the petitioner's certificates do not facially establish eligibility for the national interest waiver. Counsel clearly considers these certificates to be significant, listing them again on appeal, while at the same time protesting that privacy considerations prevent the petitioner from showing that her achievements exceed those of others in her field. The director did not require the petitioner to establish exceptional ability in her field. Instead, the director observed that the petitioner's certificates do not show that the petitioner's work has had an influence beyond the school districts where she has worked.

As is clear from a plain reading of the statute, engaging in a profession (such as teaching) does not presumptively exempt such professionals from the requirement of a job offer based on national interest. Congress has not established any blanket waiver for teachers. Eligibility for the waiver rests not on the basis of the overall importance of a given profession, but rather on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.